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No. 841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. and

EASTERN AIR LINES, INC.,

Petitioner,

v.

UNION TRUST COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EASTERN AIR LINES, INC.,

Petitioner,

v.

UNION TRUST COMPANY, *et al.*,

Respondents.

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc., defendant in the District Court, prays that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the District of Columbia Circuit (Nos. 11,991 and 11,992) which upon remand from this Court affirmed judgments of the United States District Court for the District of Columbia.

Prior Decisions of this Court and Opinions Below

Prior decisions of this Court in these cases are reported in 350 U. S. 907 and 350 U. S. 962 and are appended hereto (App. pp. 38a-39a).[1] The original opinion of the

[1] Record and other references appear in parentheses as follows: The Joint Appendix in the Court of Appeals which consists of 11 volumes, is designated by "JA", the volume thereof is designated by Roman numeral and page number thereof by arabic numeral, thus "IJA 50" refers to page 50 of the first volume of the Joint Appendix. The references "App. p. " are to the separately bound appendix filed with this petition.

Court of Appeals is reported in 221 F. 2d 62; 95 U. S. Appeals D. C. 189. The opinion of the Court of Appeals after remand from this Court is reported in 239 F. 2d 25, — U. S. App. D. C. —. Both opinions of the Court of Appeals are appended hereto (App. pp. 1a-38a and 40a-54a). The opinion of the District Court in the companion Tort Claims Act cases is reported in 113 F. Supp. 80 and is also appended hereto (App. pp. 55a-66a).

Jurisdiction

The judgment of the Court of Appeals which reversed the District Court judgment and granted petitioner a new trial was entered on February 8, 1955. Petitions for the rehearing of that judgment by the Court of Appeals en banc, and by the original division, filed by respondents, were denied on April 15, 1955 and May 11, 1955, respectively. Thereafter, on petition of the present respondents, this Court granted certiorari and reversed the judgment of the Court of Appeals on December 5, 1955 (350 U. S. 907). Thereafter this Court entertained the present petitioner's petition for rehearing, and reopened and modified its order of December 5, 1955 and remanded the case to the Court of Appeals to permit that Court to pass on the several issues left undecided (350 U. S. 962). Thereafter on September 20, 1956 the Court of Appeals (Wilbur K. Miller, Circuit Judge dissenting) passed upon the remanded issues and affirmed the judgment of the District Court (239 F. 2d 25; App. p. 40a). A petition for rehearing to that Court, timely filed, was denied on January 7, 1957. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Is publication in the Federal Register of a purported substantive federal regulation, which imposes civil and penal sanctions, necessary to give existence and validity to such purported regulation under the Administrative Procedure Act as decided by the Court of Appeals for the Ninth Circuit;[2] or is such publication unnecessary as decided by the Court of Appeals for the District of Columbia in the judgment below?

2. Did the Approach and Landing Pattern of the Washington National Airport which was never published in the Federal Register, either before or after its purported adoption, become a valid and binding Federal Regulation justifying a jury instruction that an airplane's departure from such pattern would constitute negligence *per se*?

3. Where the *jury* case against petitioner Eastern and the *non-jury* case against the United States were tried simultaneously on the same record, and the District Court in the non-jury case made a finding of fact (that Eastern's DC-4 *was* cleared to land) exactly contrary to the jury finding (that Eastern's DC-4 was *not* cleared to land), in view of such an extraordinary conflict, did the District Court's refusal to set aside the verdict and grant Eastern a new trial constitute an abuse of discretion (as the dissenting opinion below concluded) especially in view of the

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[2] *Hotch* v. *U. S.* (1953), 208 F. 2d 244; rehearing 208 F. 2d 249; second rehearing (1954) 212 F. 2d 280.

numerous other defects and anomalies disclosed by the record, including the jury's exoneration of the Bolivian pilot who, flying blind, struck the DC-4 from above and behind without ever having seen it; and the statement of the majority of the Court of Appeals "that the verdicts were *not so clearly* against the weight of the evidence or *so plainly* the result of passion, prejudice and sympathy, *or otherwise so unjust* that the trial judge can be said to have abused his discretion in refusing to grant a new trial".

Statutes and Regulations Involved

The Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. 1001 et seq.; the Federal Register Act, 49 Stat. 500, as amended, 44 U. S. C. 301 et seq., the Washington National Airport Act, District of Columbia Code, § 7-1301-1307; Washington National Airport Regulations 14 Federal Register 6247, 14 CFR 570.55; and the Air Traffic Rules 14 CFR Pt. 60, both as of November 1, 1949. The relevant provisions of these statutes and regulations appear in the Appendix of this petition.

Statement of the Case

At 11:46 a. m. on November 1, 1949, a clear bright day, an Eastern Air Lines DC-4 passenger transport plane, on a regularly scheduled flight, with 51 passengers and a crew of 4 was about to land on runway No. 3 at the Washington National Airport. It was on final approach and 300 feet from the ground when it was struck from *above* and *behind* by a high speed P-38 military plane owned by

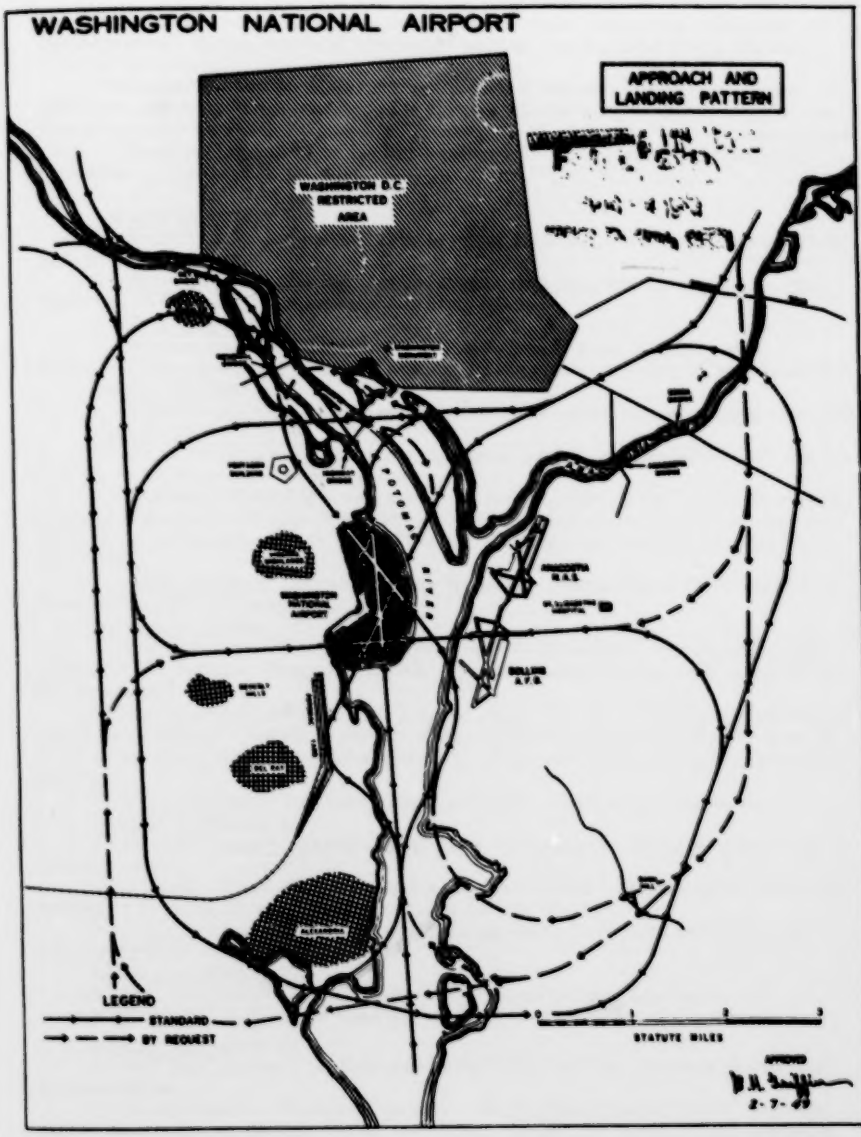
the government of Bolivia and operated by Eric Rios Bridoux, a Bolivian army pilot. The left propeller of the P-38 cut through the fuselage of the DC-4 just aft of the wings, cutting the DC-4 in two. All aboard the Eastern plane were killed. The Bolivian pilot, the only survivor of the disaster, admitted from the witness stand that he had engine trouble and was in a hurry to land, and that he was flying blind—viz, the visual obstructions of the P-38 cockpit so limited his vision that he never saw the airliner which he struck down. The structural expert of the Civil Aeronautics Board found that the landing gear of the P-38 had crashed through the roof of the DC-4, leaving red paint marks from the belly tanks of the P-38 on the top of the fuselage of the DC-4. The jury, nevertheless, exonerated the Bolivian.

Numerous Tort Claims suits were brought against the Government on the grounds that the air traffic controllers in the airport control tower had failed in their duty to separate the planes, and to advise each of the proximity of the other. Numerous death actions were brought against Eastern Air Lines and Bridoux. The main allegation of negligence against Eastern was a claim that the DC-4, in its landing approach, did not fly in accordance with the traffic, or landing pattern, of the Washington National Airport. Two cases were selected for trial and were stipulated to control all others on the issues of liability, and locus of the accident viz, whether the collision occurred in Virginia (death limit $15,000) or in the District of Columbia (recovery for death unlimited). The non-jury Tort Claims Act cases were tried to the District Judge simultaneously with, and in the presence of, the jury to which the cases against Eastern and Bridoux were tried.

The so called traffic, or landing and approach, pattern was contained in Ex. 7 (XI JA 2128-3, 2128-4), and for the convenience of the Court it is reproduced at page 7 hereof. It was primarily for noise abatement (IV JA 853; VII JA 1518; VIII JA 1653; IX JA 1832), and consisted of certain lines drawn over a map of the airport and vicinity, purporting to show the general flight paths for planes landing on, and taking off from, the various runways, together with printed directions. For landing on Runway 3 it shows a southerly path, partially parallel to the runway, to an area south of Alexandria, Va. That was the "downwind leg"; then a 90° turn east until over the Potomac. That was the "base leg"; then a turn northerly over the river culminating in an "S" turn to line up with the 30° heading of Runway 3. This pattern was never published in the Federal Register either before or after its adoption, although the traffic patterns for LaGuardia and Idlewild Airports in New York and Newark Airport in New Jersey had been duly published in 14 FR 479; nor was Ex. 7 adopted in accordance with the requirements of the Administrative Procedure Act. It was published in the Airman's Guide, and Eastern was aware of it.

It was stipulated in the pretrial order that on that fateful morning the DC-4 duly reported its approach to the Washington Control Tower in routine manner, and was cleared to enter the traffic pattern for a landing on Runway 3. The DC-4 entered the traffic pattern and followed through on its downwind leg, west of and parallel to Runway 3, but did not go south of Alexandria. Instead it made a circular turn over the Richmond, Fredericksburg & Potomac Freight Yards and lined up on its final approach to Runway 3, and was again back in the pattern, when it was struck by the P-38 at an altitude of 300 feet.

Plaintiffs' Ex. No. 7



Plaintiffs' Ex. No. 7

WASHINGTON NATIONAL AIRPORT
APPROACH AND LANDING TRAFFIC PATTERN

Patterns are designed for landings on each runway under VFR conditions. (Caution Note): Heavy traffic at Anacostia, Bolling, and Andrews Field, and the area between them.

Remain as high as possible over residential areas and descend over water whenever possible. When landing in the Northern Quadrant pass to the south of the City of Alexandria whenever possible. Runway 18-36 will be utilized as much as possible. Takeoff on Runway 21 or landing on Runway 3 will be utilized infrequently, depending on the force of the wind.

Landing on Runway 36

1. Standard left hand pattern remain above 1200' until over the Potomac River and on final approach.
2. (Upon Request) Southwest bound traffic may use right hand pattern. Proceed well to the east of Anacostia and Bolling Fields.

Landing on Runway 3

1. Remain above 1200' until over Potomac River, make approach over Potomac River, make left turn upon passing PEPCO plant, and line up with Runway 3.

Landing on Runway 9

1. Standard left hand pattern remain above 1200' until turning on final approach.

Landing on Runway 15

1. Northwest bound, north bound, right hand pattern remain above 1200' until turning on base leg west of Pentagon.
2. Southwest bound flight may proceed either via east of the Capitol or via the Northwest Passage. Flights to remain above 1200' until east of Capitol or over the river at the Georgetown Reservoir. (Pilots to advise on "in range" report which is desired).
3. (Upon Request) Left turn in may be made - remain above 1200' until on base leg or west of Pentagon.

Landing on Runway 18

1. Northwest bound and north bound - right hand pattern - remain above 1200' until over the Potomac River on base leg. Follow a pattern to the west and north of the Pentagon.
2. Southwest bound flights may proceed either via east of the Capitol or via the Northwest Passage. Flights to remain above 1200' until east of Capitol or over the river at the Georgetown Reservoir. (Pilots to advise on "in range" report which is desired).
3. (Upon Request) Left turn in may be made - avoid restricted area.

Landing on Runway 21

1. Southwest bound - remain above 1200' until pass the Washington National Guard Armory.
2. Southeast bound, northeast bound and north bound - remain above 1200' until turning on base leg or east of Anacostia and Bolling Fields.
3. (Upon Request) Right turn in remaining above 1200' until over the river past Georgetown Reservoir.

Landing on Runway 27

1. Left hand pattern - remain above 1200' until on final approach.
2. (Upon Request) Right hand pattern - for southwest bound flights only.

Landing on Runway 33

1. Left hand pattern - remain above 1200' until on final approach or over the Potomac River.
2. (Upon Request) Right hand pattern - for southwest bound flights. Proceed east of Anacostia and Bolling Fields and remain above 1200' until on final approach.

The Air Traffic Controller in the tower, who was directing Eastern's landing, testified that the DC-4 was exactly where it was supposed to be when it was struck; that he had cleared the DC-4 to land,[3] and that such clearance authorized the airliner to turn and land on the indicated runway. It need *not* follow through in the flight configuration south of Alexandria shown on Ex. 7. The Administrator of Civil Aeronautics at the time of the accident, Mr. Dallas W. Rentzel, was called by the trial court as its own witness to testify whether a clearance to land authorized an airplane in the traffic pattern, to leave the pattern and land on the indicated runway immediately without following through its further configuration. He testified that it did. The testimony of the other controllers in the tower was the same.

Respondents' counsel in his opening to the jury conceded that the DC-4 had been cleared to land prior to the collision, and there was no claim in the pleadings, nor in the pretrial order, that it had not been so cleared. The claim to the contrary did not emerge until the trial was some weeks old.

The traffic pattern, Ex. 7, was admitted into evidence over petitioner's objection and exception, and the trial court instructed the jury that it was a binding Federal Regulation, a breach of which would constitute negligence *per se* (X JA 2109) to which petitioner excepted (X JA 2122). Petitioner's objection, fully argued (IV JA 843-865) was based on the conceded fact that Ex. 7 was not adopted in conformity with the Administrative Procedure Act, and was never published in the Federal Register.

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[3] The tower communicated with the traffic by voice radio, and on various frequencies. The frequency for commercial traffic such as the Eastern plane was 119.1 megacycles. The frequency for military planes, such as the P-38, was different. It was 126.18 megacycles, called the Baker Channel. Neither could hear the other. Even when on the same frequency a plane could not receive or hear while it was transmitting. Its receiver was muted.

The admissibility of Ex. 7, and its character and effect as a binding Federal Regulation, was also presented to and rejected by the Court of Appeals in both of its opinions (221 F. 2d 62; 239 F. 2d 25).

The only evidence that Eastern was not cleared to land was the negative testimony of Lt. Shaw, the co-pilot of a National Airlines' plane, flying into Washington a few minutes behind Eastern. Shaw said *he did not hear* any such clearance on his radio. Another pilot, Captain Ator of American Airlines, was awaiting take off just before the collision. He was waiting because he was told by the tower to hold take off until after the Eastern DC-4 had landed. The Bolivian pilot testified that he was told by the tower that he was No. 2 to land on Runway 3. His radio was on the military frequency, or "Baker Channel" of 126.18 megacycles.

The District Court submitted to the jury, as a question of fact, whether the DC-4 had been cleared to land prior to the collision, and instructed them, as a matter of law, that if it had been cleared to land there could be no violation of the traffic pattern, because such a clearance authorized an airplane to leave the pattern and come in and land as soon as the pilot's judgment and the proper management of the plane dictated (X JA 2114). He further instructed them that once a plane is cleared to land it is entitled to assume that no other plane has been cleared to land on the same runway at the same time, and to assume that all other aircraft in the control zone have been properly separated from it, and do not constitute a collision hazard to it (X JA 2111). Thus the other minor and trifling allegations of fault, such as lookout, right of way, etc. were expressly removed from jury consideration if the DC-4 had been cleared to land. That was so because once the DC-4 was cleared to land even if it saw the P-38, the Air Traffic Rules gave the DC-4

the right of way (14 CFR 60.14), required it to maintain its course and speed (id.), and its reliance on the tower led it to believe no traffic (seen or unseen) was a collision hazard to its tower directed course.

The jury exonerated the Bolivian pilot and returned a verdict against Eastern. Necessarily implicit in that verdict is the finding that the DC-4 was *not* cleared to land. Eastern's motions for judgment n. o. v. and for a new trial were denied; but two months after the jury finding that Eastern was *not* cleared to land, the District Judge in deciding the Tort Claims suits found that Eastern *was* cleared to land (113 Fed. Supp. 80, App. p. 55a), and his finding in this regard was affirmed by the Court of Appeals (221 F. 2d 62, 78) and by this Court (350 U. S. 907). The principal basis for imposing liability on the control tower was the express finding that *it cleared both planes to land on the same runway at the same time;* and that it otherwise failed in its duty properly to separate the traffic, and keep planes advised of the position and movements of other planes (113 Fed. Supp. 80, 84).

Eastern appealed the jury's finding and the Court of Appeals reversed and ordered a new trial (221 F. 2d 62, App. p. 1a). The ground of reversal was that the only evidence the DC-4 was *not* cleared to land was the negative testimony of Lt. Shaw that *he did not hear it;* that Shaw was busily occupied in the task of flying a large commercial transport plane to a landing; that he was not handling its radio; that he could not be attentive at all times; that in any event his radio was muted while his captain was transmitting; and under such circumstances his negative testimony that he did not hear Eastern cleared to land was not sufficient to create a question of fact in the face of the positive and affirmative evidence from the control tower operator that he had in fact cleared Eastern to land. In this regard the Court of Appeals

followed its local law citing *Small* v. *Penn. R. R.*, 65 App. D. C. 112, 80 F. 2d 704, and similar authorities throughout the country. The Court also ruled that Ex. 7 had been properly admitted in evidence, but having ordered a new trial found it unnecessary to pass upon Eastern's new trial motions.

The present respondent then petitioned this Court for certiorari to review that judgment of the Court of Appeals claiming that the Court of Appeals' reversal was an invasion of the jury's province and an impairment of the right of a jury trial. Solely on the petition and brief in opposition this Court (Mr. Justice Frankfurter and Mr. Justice Harlan dissenting from the grant) granted certiorari and in a per curiam decision of December 5, 1955, reversed the judgment of the Court of Appeals (October Term 1955, 350 U. S. 907). Thereafter and on February 27, 1956 this Court granted rehearing, reopened its order of December 5, 1955, and modified the same by remanding the case to the Court of Appeals to permit that Court to pass upon the several issues which it had not previously passed upon (350 U. S. 962).

The issues not previously passed upon by the Court of Appeals were mainly those raised by the District Court's denial of petitioner's motion for a new trial. The grounds were that the denial constituted an abuse of discretion because (1) the manifest and irreconcilable conflict between the Court's fact finding that Eastern *was* cleared to land and the jury's finding that it was *not* cleared to land made the verdict patently inconsistent and contradictory; that both could not be true on the same record, and required that the issue of landing clearance be resolved by a new trial; (2) that further the verdict was *shocking* and *grotesque* in that it held Eastern liable and at the same time exonerated the Bolivian pilot in the face of his own admissions that he was flying his plane in such fashion he never saw the plane which he struck—this demonstrating

that the verdict was based on passion, prejudice and sympathy for the Bolivian pilot; and (3) in that it found, contrary to the physical facts and the accepted expert testimony that the collision occurred in the District of Columbia.

These remanded questions were briefed and argued to the Court of Appeals on remand, and on September 20, 1956 that Court, dividing two to one, rendered a judgment affirming the District Court (239 F. 2d 25).

In its September 20, 1956 opinion written for the Court by the dissenting judge, Wilbur K. Miller (221 F. 2d 62; App. p. 1a) the Court was unanimous in its conclusion that it had the power and duty to reverse and order a new trial if the trial judge had abused his discretion in denying petitioner's motion for a new trial. It was also, as we read the decision, unanimous in its conclusion that the verdict *was in fact* contrary to the evidence, and *was in fact* the result of passion, prejudice and sympathy (221 F. 2d 62, App. p. 1a). But Chief Judge Edgerton and Circuit Judge Fahy felt that the verdict, although contrary to the evidence, and the result of prejudice and sympathy, was *not sufficiently so* to constitute an abuse of discretion on the part of the trial judge in refusing to grant a new trial.

Circuit Judge Miller dissented. He said that the denial of a new trial *was* an abuse of discretion; that it was demonstrable beyond peradventure that the verdict was flagrantly against the great weight of the evidence and that grave injustice would flow from it. He pointed out that from the same evidence which the jury heard, the trial judge found the tower operator had negligently cleared *both* planes to land on the same runway at the same time and found against the United States principally because of that negligence. He also felt that the exonera-

tion of Bridoux stamped the verdict with an unmistakable character of sympathy for him and prejudice to Eastern, and he called attention to the anomaly that petitioner and the United States have *both* been mulcted in damages on contradictory findings on a single fundamental factual issue, and to the miscarriage of justice which has thereby resulted. Judge Miller was unwilling to believe the Court was powerless to right such a wrong. Petitioner's timely petition for rehearing to the Court of Appeals on January 7, 1957 was denied.

The statement of this case would not be complete without reference to another extraordinary conflict presented by the record. The jury on special interrogatory found that the collision occurred over the District of Columbia, where recovery for wrongful death is unlimited. The District Judge adopted that finding in the Tort Claims actions. However the Court of Appeals, because the Government's "acts or omissions" originated in the control tower which is located in the Commonwealth of Virginia (wrongful death limit $15,000), reversed the District Court on this point, Circuit Judge Miller dissenting, and held that under the Tort Claims Act (28 U. S. C. 1346(b)) the ordinary rule of conflicts did not apply and the applicable death statute was that of Virginia. Thus we have another rare and unusual situation. The United States has been held liable because it *cleared* the Eastern DC-4 to land and the law applicable has been held to be that of Virginia. For the same accident and on the same record Eastern Air Lines has been held liable because its plane was *not* cleared to land, and the law applicable has been held to be that of the District of Columbia. The Government's liability for the death of these 51 passengers has been held to be limited by the $15,000 per person. Eastern's liability to the same persons in the same accident has been held to be unlimited.

Since the District of Columbia boundary at this point extends to the western bank of the Potomac (App. pp. 72a-73a) the determination of the locus of the collision turned on whether it happened over land (Virginia) or over water (District of Columbia). The narrowness of the area involved (District Judge's observation at 113 Fed. Supp. 80, 85; App. p. 65a) and the recognized inability of untrained observers to visually measure depth perception in the air against horizontal distance on land or water, made the testimony of the ordinary ground witnesses concededly unreliable, although there was plenty such testimony on both sides. The trained observers in the control tower placed the collision over land. Numerous pieces of wreckage from the DC-4, heavy objects, passengers' effects, etc. fell on land in the Potomac Yard, and on both sides of the Memorial Highway. The DC-4 was going 130 miles per hour and the accepted scientific testimony was that heavy objects, if dropped at such a speed, would continue in the flight path (30°) for 830 feet before they reached the ground. Petitioner claimed that this conceded scientific law, and the stipulated physical facts that heavy objects landed in Virginia, removed any question of fact on this point, and that the jury finding that the collision occurred in the District of Columbia was contrary to physical facts and known scientific law. To justify the jury finding on this point those heavy objects would *have to have flown backward.* The Court of Appeals did not decide this point in its original opinion (221 F. 2d 62), but on June 24, 1955 in response to respondents' motion for clarification, it affirmed the District Court on the "situs" point. Heretofore it has not been possible to raise the point in this Court.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals erroneously decided a Federal Question of major importance under the Administrative Procedure Act in a manner precisely contrary to the decision of the Court of Appeals for the Ninth Circuit in *Hotch* v. *U. S.*, 208 F. 2d 244, 250; 212 F. 2d 280, and in a manner which aborts the objectives and intents underlying the enactment of the Federal Administrative Procedure Act.

Overruling respondents' contention, both the District Court and the Court of Appeals decided that the Washington National Airport landing pattern (Ex. 7), although not adopted in accordance with the rule making processes specified in the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. 1001(c), 1002(a)(3), 1003), and never published in the Federal Register, nevertheless constituted a binding Federal Regulation, breach of which would be negligence *per se* (221 F. 2d 62, 65, 68-69, App. pp. 5a, 10a-13a; 239 F. 2d 25, 28, App. pp. 42a-43a). In so holding, the Court of Appeals decided a question of great public interest and importance, and decided it in exact conflict with the decision of the Ninth Circuit Court of Appeals in *Hotch* v. *U. S.*, 208 F. 2d 244, 250, 212 F. 2d 280.

This question has never been before this Court in this or in any other case. Eastern Air Lines was respondent when this case last came to this Court on certiorari (350 U. S. 907). The judgment of the Court of Appeals reviewed in 350 U. S. 907 had given Eastern a new trial. Consequently Eastern had no right or occasion to request

a review of the question. However the existence of the question was called to the Court's attention in Eastern's rehearing petition, on which a further per curiam order was made herein on February 27, 1956 (350 U. S. 962).

A reproduction of the disputed exhibit (Exhibit 7) appears at page 7 of this petition.[4] It consists of a map of the airport on which certain lines representing flight paths are drawn, accompanied by a page of printed instructions. It is conceded that no part of this exhibit was ever published in the Federal Register either before or after its purported adoption.

In brief the history underlying this exhibit is as follows. The Washington National Airport Act (Act of June 29, 1940, 54 Stat. 686, Ch. 444; District of Columbia Code, §§ 7-1301-1307) established the geographical boundaries of the airport, and placed it under the operation and control of the Administrator of Civil Aeronautics, Sec. 2 (D. C. Code, Sec. 7-1302) who was empowered "to make and amend such rules and regulations as he may deem necessary * * *". Pursuant to this Act the Administrator from time to time published regulations with respect to the Washington National Airport (See 6 FR 5134, effective October 9, 1941; 12 FR 464, effective January 23, 1947 and sections re-designated and renumbered in 13 FR 3047 and 14 FR 38). In 14 FR 5541 (September 9, 1949) the Administrator published in the Federal Register a notice of proposed rule making, giving notice that he intended to revise the regulation pertaining to the Washington National Airport, 14 CFR Part 570, and quoting a proposed revised regulation but *not* quoting the traffic pattern (Ex. 7) either in form or substance; and not making any finding that its publication was dispensed

[4] Ex. 7 consisted of both Landing and Take-off Patterns. Since the Landing Pattern alone is relevant here, we have not reproduced the Take-off Pattern at p. 7 supra.

with in the public interest. Section 570.55 of the proposed regulation read:

> § 570.55. *Landing and take-off rules.*
>
> (a) • • •
>
> (b) • • •
>
> (c) Aircraft landing or taking off shall conform to the air traffic pattern as published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport" (14 FR 5544).[5]

On October 14, 1949, *seventeen* days before this accident, the regulation was published in definitive form (still without Ex. 7) in the Federal Register for October 14, 1949 (14 FR 6247-6252), with a finding by the Administrator that public interest required it to go into effect immediately, and that the 30 day deferred effectiveness provision of the Administrative Procedure Act was waived. It then became 14 CFR 570, and was published in a supplement to the 1949 Edition of the Code of Federal Regulations.

The Administrative Procedure Act of June 11, 1946, Ch. 324, 60 Stat. 237, 5 U. S. C. 1001 et seq. "is a new basic and comprehensive regulation of (administrative) procedures." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36 (1950). It "was framed against a background of rapid expansion of the administrative process as a check upon

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[5] The Airman's Guide is a semimonthly publication of the Department of Commerce printed and distributed by the Government Printing Office to those who buy it. It contains information and data of interest in the field of aviation, and being published at regular intervals it reports current changes. Thus in order to find the traffic pattern for the Washington National Airport, a pilot whether he be a commercial air transport pilot, or an itinerant flyer, would have to have recourse to the numerous issues of the Airman's Guide, and certainly to the latest issue to see if there had been any overnight changes.

administrators whose zeal might otherwise have carried them to excesses in contemplating the legislation creating their offices. *It created safeguards even narrower than the constitutional ones against arbitrary official encroachment upon private rights.*" *U. S.* v. *Morton Salt,* 338 U. S. 632, 644 (1950, our emphasis).

The Administrative Procedure Act became law some 11 years after the Federal Register Act was enacted on June 26, 1935 (49 Stat. 500 et seq., 44 U. S. C. 301-314). The latter Act had its genesis against the now familiar background of the *Hot Oil* case, *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 412; and it required all documents and rules having "general applicability and legal effect" to be published in the Federal Register, 44 U. S. C. 305(a). Even more basically it stipulated that "the original and two duplicates or certified copies" of all documents required to be published must *first* be *filed* with the Federal Register Division of the National Archives Establishment,[6] and "shall be printed and distributed forthwith by the Government Printing Office in the publication designated the 'Federal Register'" (Sec. 303); and "No document required by Section 305(a) to be published * * * shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals * * * shall have been duly filed * * *" (Sec. 307). All required notices of hearing and opportunities to be heard were to be published in the Federal Register not less than 15 days before the hearing, unless the particular statute otherwise specified (44 U. S. C. 308). Any document prescribing a penalty or imposing an obligation is declared to be of "general applicability and legal effect" 44 U. S. C. 305(a)(3); 1 CFR 1.32 Edition of 1949.

Enriched by the experience with the Federal Register

[6] National Archives Establishment was transferred to General Services Administration by Sec. 104(a) of the Act of June 3, 1949, Ch. 288, 63 Stat. 381, 44 U. S. C. 391.

Act, the Congress vastly extended the frontiers of administrative regulation by the Administrative Procedure Act. The administrative rule making process, both substantive and adjective, was now carefully regulated by a statute of general application to all "agencies". No rule could be made, and no sanction imposed, "except within jurisdiction delegated to the agency, and as authorized by law" 5 U. S. C. 1008(a). Notice of the proposed rule making must be published in the Federal Register; and all interested persons must be afforded an opportunity to submit their views, 5 U. S. C. 1003(a); and "Every agency shall separately state and currently publish in the Federal Register * * * (3) substantive rules adopted as authorized by law * * *". 5 U. S. C. 1002(a); then with pointed emphasis on *substantive rules,* their publication "shall be made not less than thirty days prior to the effective date thereof" unless there be good cause found, and published with the rule, for making it immediately effective. 5 U. S. C. 1003(c).

Exhibit 7 was a "substantive rule" within the meaning of the Act. It purported to bind all planes, public and private, landing and taking off at the airport. It was of *"general applicability and legal effect". "Sanctions"* were attached to it. It was *penal* in character. Sec. 570.131 of the Washington National Airport Regulation, 14 Federal Register 6247-6252, October 14, 1949; 14 CFR 570.131, makes violation "of any rule or regulation prescribed in this part" a misdemeanor, punishable by six months' imprisonment, or a fine of $500, or both. Thus if the courts below are right, an unauthorized departure from the flight paths drawn on Exhibit 7 became a misdemeanor—notwithstanding that the pattern was not published with the notice of intention to adopt it; nor with the definitive regulation, in the Federal Register. We say that these defects were fatal, and the rule never came into being as a federal regulation.

The Administrator of Civil Aeronautics was well aware that traffic patterns had to be published in the Federal Register in order to be binding. He had already published the traffic patterns for LaGuardia Field and Idlewild (International) Airports in New York, and for Newark Airport in New Jersey on February 4, 1949 (14 FR 479), and he has continued to publish revisions of those patterns from time to time since then. His action in this regard is a contemporary administrative construction of the Act. *White* v. *Westchester Club,* 315 U. S. 32, 41 (1942); *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501 (1948). His failure to do the same with Exhibit 7 is a fatal defect. He recognized that defect after the disaster by publishing the traffic pattern for the Washington National Airport in full as part of the Air Traffic Rules, 17 FR 7178-7181; August 7, 1952, 14 CFR 60.18-7; and by amending section 570.55 of the Washington National Airport Regulation to read as follows:

> "§ 570.55 *Landing and take-off rules*
>
> • • •
>
> (c) Unless otherwise authorized or directed by air traffic control, landings and take-offs shall be made in conformity with the air traffic patterns prescribed by the Administrator in § 60.18-7 of this title. (The patterns are also published jointly in the Airman's Guide by Anacostia Naval Air Station, Bolling Field, and Washington National Airport.)" 17 FR 7181

and he has continued to publish revisions of Exhibit 7 from time to time since.

Notwithstanding the clear mandate of the Administrative Procedure Act and the Administrator's own administrative construction of the Act with respect to the publication of traffic patterns, the District Judge and the Court of Appeals held that Exhibit 7 was a binding fed-

eral regulation. The Court of Appeals said that although not published in the Federal Register, Exhibit 7 "had been officially prescribed * * * and Eastern had knowledge of it" 221 F. 2d 62, 69. Therefore the Court concluded that Exhibit 7 was a binding federal regulation, breach of which would constitute negligence *per se*. The Court did not explain what "officially prescribed" means, nor did it enter upon any discussion of the Administrative Procedure Act, nor the elaborate structure erected by that Act, to safeguard the rights of the public from arbitrary administrative fiat.

In so deciding the court below adopted a view exactly contrary to that which the Court of Appeals for the Ninth Circuit, had arrived at in the earlier case of *Hotch* v. *U. S.*, 208 F. 2d 244, 250, 212 F. 2d 280.[7] There Hotch was convicted of violating a Department of the Interior regulation closing the water of Taku Inlet to commercial fishing. His conviction was affirmed by the Court of Appeals for the Ninth Circuit, 208 F. 2d 244, but on rehearing Hotch, for the first time, attacked the existence and validity of the regulation on the grounds that it had not been published in the Federal Register. The Court of Appeals reversed the conviction on the ground that the purported regulation never came into legal existence. The Government then petitioned for rehearing of the Court's decision on rehearing, upon the ground that Hotch admitted he had *actual* notice of the purported regulation, and that such actual knowledge made publication in the Federal Register unnecessary as to him. The Court affirmed and rejected that view and adhered to its previous (rehearing) decision 212 F. 2nd 280.

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[7] Although the opinion of the Ninth Circuit on the second rehearing in the *Hotch* case, 212 F. 2d 280, was called to the attention of the Court of Appeals, it is not cited in the original opinion 221 F. 2d 62, nor in the opinion handed down after remand 239 F. 2d 25.

Circuit Judge Stephens, writing for a unanimous bench, carefully analysed the Federal Register Act and the Administrative Procedure Act. He rejected the contention that these Acts were merely in the nature of recording statutes designed to give *constructive* notice to those who are without actual notice. He recognized the Administrative Procedure Act as inaugurating a new departure in the field of administrative law, and he ruled that the objects, purposes and intent of the Act were such as to "require publication, irrespective of actual notice, as a prerequisite to the *issuance* of a regulation * * *", 212 F. 2d 280, 283-4.

The view of the Ninth Circuit is manifestly the correct view. It effectuates the objects, purposes and intent of the Administrative Procedure Act[8], in addition to comply-

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[8] See Administrative Procedure Act—Legislative History 79th Congress, 1944-46, Senate Document 248, Foreword by Senator McCarran; and see House Committee Report No. 1980 79th Congress printed at pp. 235-282 of that Document. See also Attorney General's Manual on the Administrative Procedure Act, 1948, I. C. C., Practitioners Journal, Vol. XV No. 5; also Final Report, Attorney General's Committee Jan. 24, 1941, Senate Document 8, 77th Congress, First Session.

District Court decisions dealing with the effect of non publication are found in *Woods* v. *Benson Hotel Corp.*, D. C. Minn. 75 F. Supp. 743, 748 affirmed 168 F. 2d 694 where the court declined to enforce an interpretive bulletin of the Housing Administration because of the failure to publish in the Federal Register. *U. S.* v. *Morelock*, D. C. Md., 124 F. Supp. 932, 945, where the court held that the failure of the Secretary of Agriculture to publish in the Federal Register his instructions to wheat growers that they should aid Government representatives in the measurement of wheat acreage, deprived such instructions of any binding validity. *Brownell* v. *Schering Corp.*, D. C. N. J. 129 F. Supp. 879, 904 affirmed 228 F. 2d 624, cert. denied 351 U. S. 954 held that the directive of an alien property custodian addressed to a particular corporation was not of such "general applicability and legal effect" as to require publication in the Federal Register. *U. S.* v. *Reed*, D. C. Md. 110 F. Supp. 253, 256 held the publication of a form of truck driver's log required by the Interstate Commerce Commission was not necessary where the order direct-

ing with its plain words. The structure of the Act is such that it sets up some ten areas in which the acts of administrative agencies are made subject to detailed control (Senate Document No. 248, 79th Congress pp. 193-195) including for example "Public Information", "Rule Making", "Adjudication", "Powers and Sanctions", "Review" etc. Of all these we dare say that public information and rule making are the most basic. The *Hot Oil* situation dramatized the deplorable lack of public information, but its immediate result was the Federal Register Act, not the regulation of the rule making activities of "agencies".

The Administrative Procedure Act went far beyond the Federal Register Act, and among other things, set up the procedure which must be followed in order to give an agency regulation the force and effect of law, binding upon the public. Probably the most fundamental requirements of the rule making process set up by the Act was that the public be informed; that notice of the rule making and opportunity to be heard thereon be duly given by publication in the Federal Register, 5 U. S. C. 1002 (a)(b), 1003(a)(b); that after adoption all *substantive rules* be "separately stated" and currently *published* in the Federal Register; and that such publication must be 30 days *prior* to their effective date of the rule, 5 U. S. C. 1003(c), Senate Document 248, 79th Congress, pp. 16, 20, 193-194, 255-256, 257-259; Attorney General's Manual, 1948, pp. 17, 19, 22, 26. At page 36 of the Manual the Attorney General

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ing the use of such log was published with a statement that the form, as filed with it, was made a part thereof, and a copy of the form was delivered to the defendant. See also *Durkin* v. *Edw. S. Wagner Co.*, E. D. N. Y. 115 F. Supp. 118, affirmed *sub nom. Mitchell* v. *Edw. S. Wagner Co.*, 217 F. 2d 303, 304 cert. den. 348 U. S. 964; also Judge Parker's decision, writing for a statutory court in *Rheman Co.* v. *U. S.*, 133 F. Supp. 668, applying the yardstick of the Administrature Procedure Act to the rule making powers of the Interstate Commerce Commission in enlarging the commerical zone of Charleston, S. C.; also *Allegheny Air Lines* v. *Village of Cedarhurst*, E. D. N. Y. 132 F. Supp. 871, affirmed — F. 2d —, 5 Avi. 17,166.

makes it clear that the so called "deferred effectiveness" provisions of Section 4(c) of the Act, 5 U. S. C. 1003(c), the 30 day lag between publication and effective date, is a most substantial element in the rule making process; that it is in addition to, and not to be confused with, the "general notice of proposed rule making" of Section 4(a), 5 U. S. C. 1003(a). The Final Report, Attorney General's Committee, January 24, 1941, Senate Document 8, 77th Congress, pp. 114-115 makes this even clearer. Publication of the substantive rule in definitive form is an essential and indispensable ingredient of the rule making process. If it is absent, there is no substantive rule binding on anyone.

To say that actual knowledge of a *purported* rule is an adequate substitute for publication in the Federal Register is to reduce the elaborate rule making structure of the Administrative Procedure Act to an absurdity. Actual knowledge may, or may not, have been sufficient under the Federal Register Act prior to the Act, but under the Administrative Procedure Act there can be no question. *Certainty* and *uniformity* in the application and effect of substantive rules was one of the prime objectives of the Act. To give the Act the sterile character of a recording statute aborts those objectives, and utterly destroys the "notice and opportunity to be heard" structure so carefully framed in Sections 4 and 7 of the Act, 5 U. S. C. 1003, 1006.

If the test of validity is actual knowledge of the purported regulation, then a "regulation" adopted in complete disregard of the rule making requirements, and "filed" in the *desk drawer* of an agency official, is valid as to one who had actual notice of the agency's intent—and the *Hot Oil* situation is back with us again. The absurdity of such a proposition need not be elaborated to this Court.

But consider in practical effect the rule laid down by

the *Hotch* case, and contrast it with the rule laid down by the court below. Under the *Hotch* case a substantive rule is either valid or invalid, depending upon the agency's compliance with the Administrative Procedure Act. That makes for certainty, uniformity, simplicity, and order. A given regulation is either valid as to all people, or is invalid as to all. The rule of the court below is the exact antithesis. A regulation may be *valid* and *invalid at the same time*. It is valid as to one with actual knowledge, and invalid as to one without such knowledge. One man may commit a crime and incur sanctions and penalties for an act or omission, while his next door neighbor, for the same act or omission, is held innocent. One pilot may fly his plane into the Washington National Airport and incur a $500 fine because he does not follow a flight path south of Alexandria before landing on Runway 3. Another pilot landing ten minutes later does the same thing and incurs no sanctions. One pilot admits he knew of the regulation and is convicted of a crime; another denies he knew of the regulation, so no law exists upon which to convict him. But who is to say whether an accused *knew* or *did not know* of the regulation? Who is to decide this question of fact as to the existence or non-existence of a law? Not the jury, because under our carefully guarded separation of functions the jury's sole province is to take the law as instructed by the court, and apply it to the facts as they find them. The jury finds "facts". It does not find "law".

It was contended below that since the Washington National Airport regulation, 14 CFR 570, as published in the Federal Register of October 14, 1949, 14 FR 6247, provided that the landings and take-offs should conform to a traffic pattern "published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport" 14 CFR 570.55(c) such a provision (although not publishing the traffic pattern in form or substance) was sufficient compli-

ance with the Administrative Procedure Act, both as to Notice of Proposed Rule Making, and as to final publication. The Airman's Guide, issue of March 1, 1949 contained a facsimile of Plaintiffs' Exhibit 7, without any statement or explanation connecting it to 14 CFR 570.55. Considered against the background of the Act, its objectives, purposes and long legislative history, this argument is little short of being fanciful. Under it each successive issue of Airman's Guide could contain a different traffic pattern for the Washington National Airport, and the Administrator, or his delegate, could legislate, willy nilly, simply by publishing therein. Airman's Guide is not a statutory publication. No doubt it is good and useful, but it is not the Federal Register. The Administrator might with the same effect, have published the pattern in the Saturday Evening Post.[9]

The District Judge was of the view that Exhibit 7 need not be published "in haec verba" in the Federal Register as long as the Administrator had "adopted" it (IV JA 860-861). Apparently he felt the Federal Register could incorporate the Airman's Guide by reference, but which of the 26 issues per year of the Airman's Guide were to be incorporated by reference, he did not say, and neither does 14 CFR 570.55(c). But quite apart from this, the Administrative Procedure Act of course does not

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[9] The pattern as published in Airman's Guide, issue of March 1, 1949, was completely without explanation. No reference was made to 14 CFR 570, nor to the authority under which it purports to be issued. There was no indication that it was "published jointly" with Anacostia Naval Air Station and Bolling Field, or otherwise to identify it as the traffic pattern referred to in 14 CFR 570.55(c). Indeed it would have been impossible for the Airman's Guide so to have identified the pattern because it published the pattern on March 1, 1949, and 14 CFR 570.55(c) did not purport to become effective until its publication in the Federal Register on October 14, 1949. From March 1, 1949 to the date of this accident there were some seventeen issues of the Airman's Guide successively published every two weeks by the Government Printing Office.

authorize incorporation by reference. That is contrary to its plain purpose and intent. Incorporation by reference was one of the very evils which the Federal Register Act and the Administrative Procedure Act were designed to eradicate. Neither of the Courts below dealt with the problem from a "rule making" standpoint 5 U. S. C. 1003. The distinction between public information as to a definitive rule 5 U. S. C. 1002(a), 1003(c) and the requirements of rule making 5 U. S. C. 1003(a)(b), seems to have been ignored by the Courts below, though fully urged. In this regard see Mr. Justice Harlan's decision in the Second Circuit in *Air Line Pilots Assn.* v. *C. A. B.*, 215 F. 2nd 122.

It was argued below that the Federal Register need not physically contain all the minutiae of forms, drawings, etc. but that argument is patently fallacious, for *prior* to the publication of the Washington National Airport regulation (minus the pattern) in the Federal Register of October 14, 1949, the Administrator had on February 4, 1949 already published *maps, diagrams, flight patterns* and instructions, all constituting the landing patterns for the LaGuardia Airport in New York, the New York International Airport, and the Newark Airport. In publishing those maps, diagrams and flight paths the Administrator stated he was acting under the Administrative Procedure Act in prescribing the traffic pattern. 14 FR 479-481, Feb. 4, 1949.

Thus whatever Exhibit 7 was; whatever may have been its legal effect, it was not a binding and valid federal regulation. At the most it was an expression of the will or desire of the Administrator, but it was not "the law". Consequently a departure from it was *not* "negligence *per se*", and the District Court was wrong when it instructed the jury that it was (X JA 2109).

This error was a grievous one and cast great prejudice upon the petitioner airline. For, once the jury found that Eastern was not cleared to land (as they did) then they were foreclosed from considering, as a *matter of fact*, whether the operation of the DC-4 was negligent or not negligent, and *forced* to find Eastern liable as a *matter of law*. They were also foreclosed from considering whether non-conformity with Plaintiffs' Exhibit 7 had any causal relation to the accident. They were likewise foreclosed from considering whether Eastern's failure to go south of Alexandria was *evidence of any negligence*. They were charged as a matter of law (over appropriate exception) that once they found that the DC-4 was not cleared to land, then Eastern was negligent *per se*. That was the most vital issue in the whole case. It was the only basis upon which the jury could have found a verdict against Eastern. The error went to the very root of the case.

We respectfully submit therefore that the decision of the Court of Appeals for the Ninth Circuit in the *Hotch* case correctly states the law applicable to the publication requirements of the Federal Administrative Procedure Act; that the Court of Appeals in its decision below has rendered a decision in conflict with that of the Court of Appeals for the Ninth Circuit on the same matter and has decided an important question of Federal law which has not been but should be settled by this Court.

II

The Writ should be granted for the further reason that the verdict was so plainly contrary to the evidence that it cannot be sustained on any rational grounds. It was a flagrant miscarriage of justice, and the refusal to set it aside was a clear abuse of judicial discretion which should be corrected by this Court.

The basic outline of petitioner's new trial motions appears in the Statement of the Case, pp. 11-13 supra, and petitioner's case for a new trial is probably best set forth in Circuit Judge Miller's opinion on remand, 239 F. 2d 25, 28. In that opinion the Court of Appeals carefully examined its power to review the District Court's refusal to set aside the verdict and concluded that it had the *power* and *duty* to reverse and order a new trial if the trial judge's refusal to set aside the verdict constituted an abuse of judicial discretion. After a most careful review of the record the Court of Appeals, as we read their decision, concluded unanimously that the jury verdict against Eastern Air Lines in this case *was* contrary to the evidence, *was* the result of passion, prejudice and sympathy and *was* productive of injustice (239 F. 2d 25; App. p. 40a). But the majority of the Court of Appeals (Edgerton and Fahy, Circuit Judges) concluded that the verdict was "not *so clearly* against the weight of the evidence or *so plainly* the result of passion, prejudice and sympathy, or otherwise *so unjust* that the trial judge can be said to have abused his discretion in refusing to grant a new trial." (239 F. 2d 25, 30; App. p. 48a). Judge Miller writing with deep conviction earnestly dissented from the conclusion of his brothers on that point. He wrote the entire opinion for the Court of Appeals on remand and his dissenting views are set forth at 239 F. 2d 25 et seq. as well as at pp. 40a to 54a of the sepa-

rate Appendix. It is difficult to add to what Judge Miller has said; but in a case of this magnitude, importance, and complexity, petitioner believes that clarity and completeness require brief allusion to those parts of an undisputed record which demonstrate that the trial judge abused his discretion in refusing to set aside this verdict.

This case went to the jury on the theory that if the Eastern plane had received landing clearance from the control tower it was authorized to be where it was at the time of the collision, and was not in violation of the landing pattern, Ex. 7, also on the theory that a clearance to land transmitted to Eastern gave the full assurance of safety from that point on and entitled the Eastern plane "to assume that no other plane has been cleared to land on the same runway at the same time, and that all other craft in the control zone have been properly separated by the tower (from the Eastern DC-4) and do not constitute a hazard to it" (X JA 2111).

Thus on an affirmative finding that the DC-4 was cleared to land, under the Court's instruction to the jury, Eastern was entirely free of fault. Other minor and trifling, and unproved, allegations of fault on the part of the Eastern plane, viz, lookout, right of way, etc. were entirely removed from jury consideration by the instruction that if Eastern was cleared to land it was entitled to assume that all other planes had been effectively separated, and did not constitute a collision hazard.

The District Court in the Tort Claims Act cases found that the DC-4 *had* been cleared to land (113 Fed. Supp. 80; I JA 51; App. p. 55a). The Court of Appeals reviewed that finding and found it "amply justified" (221 F. 2d 62, 79; App. p. 35a). This Court affirmed (350 U. S. 907).

Under the trial court's charge to the jury Eastern could have been found liable only if it had *not* been cleared to land. Having found against Eastern the jury necessarily found that the DC-4 was not cleared to land, thus placing it in direct conflict with the fact finding of the trial judge. The result is an extraordinary and unusual situation in which, having heard the *same* evidence, from the *same* witnesses, at the *same* time, and on the *same* record the Court (as a trier of the facts) and the jury reached precisely contradictory conclusions. Such inconsistent and conflicting decisions on an identical fact issue simultaneously arrived at by two different triers of the facts on the *same* evidence from the *same* witnesses on the *same* record is a rude shock to the ordinary concepts of order and reason in the judicial process. The dissenting judge felt that this conflict of findings, when considered in the light of the other features of this record (hereinafter referred to), demonstrated beyond peradventure that the verdict was clearly contrary to the evidence, induced by passion, prejudice and sympathy, and productive of a miscarriage of justice (239 F. 2d 25, 33; App. p. 54a); but the majority of the Court felt it was not *so much* against the weight of the evidence as to constitute an abuse of the trial court's discretion in refusing to set it aside.

It is axiomatic that the proposition (whether the Eastern plane had been cleared to land) cannot be *true* and *false* on the same record, at the *same* time and under the *same* aspect. Therefore and by simple definition, either the jury was wrong in finding that the Eastern plane *was not* cleared to land, or the trial judge (as affirmed by the Court of Appeals and by this Court) was wrong in finding that Eastern *was* cleared to land.

These respondents are the beneficiaries of the strange oddity presented by this record. They have *recovered* a final judgment from the United States on a finding (af-

firmed by this Court) that the DC-4 *was* cleared to land; and they have a verdict against Eastern on a finding that it was *not*—both on the same record, and respondents parties to that record. Can they take the benefit of the finding in one case and reject it in the other? In their claim against Eastern are they not foreclosed by the findings in the final judgment which they have against United States?

This is not the ordinary situation in which two *different* juries have made conflicting findings of liability on the same accident, having heard the same or different witnesses on different records. Here the contradictory findings were made on the same evidence heard at the same time, in the same record, from the same witnesses. It violates the orderly fabric of the judicial process to accept such an alien result, and say the Court is powerless to rectify it. It is understandable that the layman is puzzled[10] and indeed the courts as well. "Certain it is, the result of conflicting answers to the same questions on the same evidence is not in the public interest and tends to bring the judicial process in disrepute" *Benbow* v. *Wolf* (1954), 9 Cir., 217 F. 2d 203, 204. We say it can, and should be, corrected by granting a new trial, and that the Courts below (as the dissenting judge said) abused their discretion in declining to order one.

The unseemly conflict presented by this record was made possible by the joinder of the jury and non-jury cases.[11]

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[10] See the editorial entitled "Legal Paradox", Washington Evening Star Oct. 4, 1956.

[11] In the interests of economizing the Court's time and public expense petitioner, respondents, and the government stipulated to try the jury and non-jury cases together; but no one did or could foresee the extraordinary course which the litigation took; nor the incredible conflict of findings on the single issue upon which defendants in both cases were held liable. Petitioner's consent was to a "fair trial", not to what took place in this courtroom.

In authorizing such a joinder *U. S.* v. *Yellow Cab*, 340 U. S. 543, 555 this Court did not overlook the difficulties inherent therein, but at the same time pointed out that "such difficulties are not insurmountable" (p. 555), citing *Engelhardt* v. *U. S.*, 69 F. Supp. 451 and similar cases in the footnote on that page.

Apparently the difficulties envisioned in the *Yellow Cab* case included the recognized possibility that as a result of the authorized joinder the District Judge and the jury might arrive at precisely contrary results on the same evidence from the same witnesses on the same record.[12] The evident solution to that "difficulty" is the corrective power which lies in the grant of a new trial. That power became a "duty" on the record presented by the case at bar. We submit that the District Judge abused his discretion; that the dissenting Judge in the Court of Appeals was right; and that the judgment below is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

But petitioner's new trial claim rests on broader grounds than the irreconcilable conflict of findings. The *identical verdict* which held Eastern simultaneously exonerated Bridoux. The exoneration of the P-38 pilot was grotesque and unnatural on its face. As the Court of Appeals said "Bridoux himself practically conceded his own negligence (of which the jury rather unaccountably

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[12] In *Capital Transit* v. *U. S.* 183 F. 2d 825, reversed and remanded *sub nom. U. S.* v. *Yellow Cab Co.*, 340 U. S. 543, the Court of Appeals of the District of Columbia opined "This [joinder] opens up the possibility of the Court and jury reaching opposite conclusions on the same questions. • • •", and felt that "paradoxical possibilities" of this sort were suggestive of a congressional contra indication to joinder. (p. 829). The same difficulty was feared by the Ninth Circuit to present an "unsolvable dilemma" to the trial judge (*Benbow* v. *Wolf*, 217 F. 2d 203). Undoubtedly it was one of the "other situations, equally insurmountable," foreseen by Judge Bryan in *Drummond* v. *U. S.*, E. D. Va. 78 F. Supp. 730, 732.

exonerated him)" 221 F. 2d 62, 79, App. p. 35a. He was having engine trouble and was in a hurry to land. He came in on a long high final descent to land on Runway 3 without dipping his nose or tipping his wings to obtain visibility (III JA 557). He admitted that the structure of his plane was such that at an altitude of 1100 to 1200 feet (II JA 433) he could *not* see anything on the ground nearer to him than two miles (II JA 444; III 55[2]). The collision was at the stipulated altitude of 300 feet and a simple mathematical computation demonstrates that at that altitude his area of obscured visibility was about 3500 feet. He could have compensated for his plane's visual limitations, but he did not do so (III JA 556; X JA 2003-2004). Under the Air Traffic Rules he was "careless and reckless" 14 CFR 60.12(c). Elementary care required him to maneuver his plane so as to compensate for its visual deficiencies *Kuhn* v. *C.A.B.* 87 App. D. C. 130, 134, 183 F. 2d 839, 843.

Accepting Bridoux' testimony on its face, the P-38 was a rude and wanton aggressor in the traffic pattern of a busy metropolitan airport. When the tower told him he was No. 2 to land he *assumed* that this was an absolute clearance; for he elected to decide for himself which plane was the No. 1 to land ahead of him. From a distance of 5 or 6 miles away he noticed a plane landing, and saw it was "more or less the same airplane" which he thought was No. 1 in the pattern (III JA 549; III JA 546-550). As a result he flew his plane, head on, into the DC-4 striking it from above and behind and killing 55 people. At this point the Court is respectfully referred to Circuit Judge Miller's analysis of the Bolivian pilot's testimony in 239 F. 2d 25, 32, as well as in the original opinion of the Court of Appeals in 221 F. 2d 62, 79.

The exoneration of this confessed aggressor whose ignorance and wanton carelessness brought death to 55 people stamps this verdict as unmistakably grotesque. We submit, the view of Judge Miller is the correct one on

the undisputed facts of this record. The only rational explanation for the exoneration of Bridoux and the finding against Eastern is that the jury was moved by sympathy for Bridoux, and by prejudice against Eastern. "The source of the jury's sympathy for Bridoux is easily seen in his testimony. His story was a moving one, even in cold print. It must have been even more dramatic and appealing when he told from the witness stand in faulty English how he had never seen the Eastern craft, how he plunged into the Potomac and how he escaped from his" doomed plane "as it lay on the bottom of the river, although he was grievously injured." 239 F. 2d 25, 32; App. p. 51a.

Judge Miller also felt the verdict was a self-evident *miscarriage of justice*. But it is another strange anomaly in this record that the two other members of the Court felt that the *degree of such injustice* was not sufficient to move a reviewing court to corrective action. That, indeed, is a sorry commentary on the power of our courts to achieve justice. Judge Miller said he was "unwilling to believe the court is powerless to right the wrong which has been done in these cases" 239 F. 2d 25, 33; App. p. 54a.

We submit that the courts are not without the power to right such a wrong; and that this Court should exercise its supervisory power and correct the gross departure by the courts below from the accepted usual course of judicial proceedings, grant certiorari and reverse the judgments below.

A concluding reference should be made to the jury finding that the collision occurred in the District of Columbia. That finding was contrary to the stipulated physical facts, and to respondent's own expert testimony. On the trial the parties stipulated (IX JA 1923-1928) that immediately following the collision the DC-4 spilled parts, wreckage and heavy objects which fell in the State of

Virginia at the points shown on Exhibits 10 and 10A (XI JA 2162, 2163). Since when she was struck the DC-4 was traveling at the agreed speed of 130 miles per hour on final approach to runway 3 (heading 30°), under the testimony of respondent's expert those heavy objects would move forward in the same direction as the plane was headed for a distance of 840 feet before striking the ground. The forward section of the plane with four engines operating moved forward and came to rest in the water some 815 feet northeast of the Virginia shore on a line parallel to runway 3 (IX JA 1923). The separated tail section of the DC-4 fell and came to rest on the Virginia shore. Manifestly the heavy objects found on both sides of Memorial Highway in the State of Virginia could not have gotten there unless the collision occurred over land—otherwise those heavy objects would have to have *flown backwards* hundreds of feet, an impossible hypothesis. For this further reason it is submitted this verdict cannot be supported on any rational ground. It contradicts the physical facts and conceded scientific laws on the basis of which the case was tried. Thus the anomalies presented by this record are further multiplied. The United States has been held liable under the Virginia death statute because it cleared the DC-4 to land, while Eastern has been held liable under the District of Columbia death statute because the DC-4 was not cleared to land. Apart from all else this speaks most eloquently to the necessity for a new trial.

Conclusion

In the judgments below the Court of Appeals erroneously decided a federal question of major importance under the Administrative Procedure Act; decided it in a manner contrary to the Court of Appeals for the Ninth Circuit; and in a manner which frustrates the objectives and intents of the Federal Administrative Procedure Act. Furthermore the verdict below was so plainly contrary to

the evidence, and the physical facts, that it cannot be sustained on any rational grounds. The conflict of findings by the District Court in the non-jury case, and the jury finding, offended the most elementary notions of order and reason in the judicial process. The exoneration of the Bolivian pilot in the face of his virtual concession of negligence makes the irrational character of the verdict self proving. It is submitted accordingly that this Court should grant this petition for a writ of certiorari, and should reverse the judgments below.

Respectfully submitted,

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